Supreme Court, U.S.
FILED
MAR 1 1996
CLERK

(4)

No. 95-668

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

AUCIELLO IRON WORKS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

JOHN D. O'REILLY, III
(Counsel of Record)
O'REILLY & GROSSO
77 Turnpike Road
Post Office Box 3118
Southborough, MA 01745
(508) 460-1500
Counsel for Petitioner.

Washington, D.C. • THIEL PRESS • (202) 328-3298

48 pp

QUESTION PRESENTED

Whether an Employer is bound by a Union's "acceptance" of an earlier Employer proposal for a collective bargaining agreement when, at the time of the Union's "acceptance", the Employer had a reasonable basis for a good faith doubt of the Union's continued majority status, and expressed that doubt within a reasonable period of time after being advised of the final erosion of Employee support for the Union, but less than one day after the Union had telegraphed its "acceptance".

PARTIES TO THE PROCEEDING

National Labor Relations Board

Auciello Iron Works, Inc.*

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* In accordance with Rule 29.6, Auciello Iron Works, Inc. hereby discloses that it has no parent company, affiliates or subsidiaries.

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OPINIONS BELOW

The opinion of the First Circuit Court of Appeals dated July 21, 1995 is reported at 60 F.3d 24 (Pet.App. 1a).[1] A copy of the Supplemental Decision and Order of the

[1] References to the Joint Appendix are designated as "App." followed by the appropriate page number(s). References to the Appendix to the Petition for Writ of Certiorari are designated as "Pet. App." followed by the appropriate page number(s).

National Labor Relations Board dated May 9, 1995 is reported at 317 NLRB No. 60 (Pet. App. 9a). The earlier decision of the First Circuit Court of Appeals dated November 30, 1992 is reported at 980 F.2d 804 (Pet. App. 59a). The original Decision and Order of the National Labor Relations Board, incorporating by reference the original Decision of the Administrative Law Judge of November 24, 1989, is reported at 303 NLRB No. 90 (Pet. App. 84a).

JURISDICTIONAL STATEMENT

On July 21, 1995, the First Circuit Court of Appeals entered its Judgment and Opinion, enforcing the Supplemental Decision and Order of the National Labor Relations Board dated May 9, 1995. Petitioner's Petition for Writ of Certiorari was filed on October 19, 1995. The Court granted the Petition on January 19, 1996. The Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves consideration of Section 7 and Sections 8(a)(1),(2) and (5) and 8(b)(1) of the National Labor Relations Act ("NLRA" or "the Act"), 29 U.S.C., §157, §§158 (a)(1),(2),(5) and 158(b)(1).

Section 7 of the NLRA, 29 U.S.C. §157, provides:

> Employees shall have the right to self-organization, to form, join, or

> assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sections 8(a)(1), (2) and (5) of the NLRA, 29 U.S.C. §§158(a)(1), (2) and (5) provide:

> (a) It shall be an unfair labor practice for an employer--
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;
>
> (5) to refuse to bargain collectively with the representatives of his em-

ployees, subject to the provisions of section 9(a).

Section 8(b)(1) of the NLRA provides:

(b) It shall be an unfair labor practice for a labor organization or its agents -

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prrescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.

STATEMENT OF THE CASE

The factual background to this case is virtually undisputed and was summarized by the United States Court of Appeals for the First Circuit in its original November 30, 1992 Decision at 980 F.2d 805 to 807. (Pet. App. 60a-65a)

The Employer maintains an iron works fabrication shop located in Hudson, Massachusetts, and had enjoyed an amicable collective bargaining relationship with Local 501 of the Iron Workers' Union for a number of years. A series of collective bargaining agreements had been negotiated without incident over those years. The

most recent agreement expired in September 25, 1988. After several negotiating sessions in 1988, a final Employer proposal, which the Union agreed to submit to the membership for approval, was rejected by the membership and the parties continued to bargain until October 13, 1988, when a second Employer proposal was presented to the membership and was rejected with a strike vote taken, resulting in a strike commencing on October 14, 1988 and with picket lines being placed at the Employer's plant. Some four weeks into the course of the strike and the picketing activity, a gradual erosion of employee support for the Union was evidenced, so that by the final week of the strike, the Employer noticed an increased deterioration of Union support. The factual basis upon which the Employer relied for its growing belief that the Union might no longer maintain strong support of the bargaining unit was the fact that several employees had elected to cross the picket line, and/or had resigned from the Union and, more importantly, had made direct comments to upper management supervisory employees, affirmatively reflecting the bargaining unit employees' lack of support for the Union. As a result of the Employer's feeling that the support for the Union was on the downslide, the Employer, at the last negotiating session between the parties on November 17, 1988, advanced a proposal which incorporated by reference some earlier points on which agreement had been reached, but which took a harder line on other points. The Union then terminated the negotiating session, and over the course of the next week, the Employer

observed additional factors which supported its earlier impression that the Union's support was rapidly deteriorating.

The picket line was withdrawn the next day, Friday, November 18, 1988, and on that day and throughout the following week of November 21, 1988, the balance of the employees returned to work and additional employees continued to make strong comments to management representatives, indicating their lack of any continuing support for the Union. Also during that week of November 21, 1988, a number of additional employees resigned from Union membership. Not only did these returning employees affirmatively express lack of support for the Union during the week of November 21, 1988, but other employees, including the Union Steward, who were presumed to have supported the Union, indicated to the company that they would not be returning, and had obtained permanent employment elsewhere. Set forth in the appendix hereto at page App. 1-2 is a summary of those employees who, after the withdrawal of the Union picket line on Friday, November 18, 1988, and throughout the week of November 21, 1988, affirmatively indicated to the company their lack of support for the Union, including their resignation from the Union, as well as a list of employees who had been supporting the Union and who advised the company that same week that they were not returning to work, as they were permanently employed elsewhere. While the Employer was in the process of assessing these dramatic events occurring during that week, and was in the process of reviewing what, if any, actions

would be appropriate in view of this now-apparent final erosion of employee support for the Union, the Union sent a Sunday evening (App. 17a, 65a) telegram to the home of the company president on November 27, 1988, purporting to "accept" the management offer of November 17, 1988, which offer had been made prior to: (a) the withdrawal of the picket line; (b) the return to work of a number of employees; (c) the withdrawal from Union membership by additional employees; (d) the increased expressions of dissatisfaction with the Union being made by employees; and (e) the determination that some employees who had been supporting the Union would not be returning to work, as they were permanently employed elsewhere. Management representatives met with their attorneys the following Monday morning, November 28, 1988, and reviewed the Employer's revised assessment as to the now-complete lack of employee support for the Union, and immediately advised the Union that it would no longer recognize the Union as the exclusive bargaining representative of the employees, and, in view of the Union's clear lack of support among employees, its prior contract proposal was no longer available for "acceptance". (App. 66a)

Based on an Unfair Labor Practice Charge filed with the Regional Office of the National Labor Relations Board alleging a statutory refusal to bargain by the Employer's refusal to consider itself bound by the Union's "acceptance" of the earlier management proposal, the Regional Office of the Board issued a Complaint on January 17, 1989, alleging the Employer violated

the Act by withdrawing recognition from the Union and by refusing to execute an agreement with the Union.

Hearings were conducted before Administrative Law Judge Zankel on June 21, August 8 and August 9, 1989, and on November 24, 1989, the Administrative Law Judge issued a decision that the issue of the Employer's good faith doubt of the majority status of the Union was, in fact, immaterial, as the Union had "accepted" the Employer's proposal immediately prior to the Employer's withdrawal of recognition. The Administrative Law Judge determined that a collective bargaining agreement between the Employer and the Union came into existence upon the Union's transmittal of its Sunday evening, November 27, 1988, telegram purporting to "accept" the Employer's last proposal, and that the Employer's withdrawal the following day of recognition and refusal to execute an agreement was, therefore, unlawful. (Pet. App. p. 84a)

Approximately a year and a half later, on June 27, 1991, the National Labor Relations Board issued a three-paragraph Order affirming the Administrative Law Judge (Appendix, p. 84a). In connection with the NLRB attempting to seek enforcement of that Order in the United States Court of Appeals for the First Circuit, the Court affirmed a number of aspects of the NLRB Order, but agreed with the Employer that the NLRB decision which had merely cited prior NLRB determinations dealing with instances where the Union's lack of support had arisen only <u>after</u> the making of

the agreement, and were, therefore, not a basis for ruling on a factual situation involving a Union's lack of support which existed <u>at the time</u> of the Union's efforts to "accept" the Employer's earlier proposal, had not adequately dealt with the factual issues presented by this case. The Court determined that the Board had "glossed over" what the Court determined to be the "tough question" presented in this case, namely whether a contract must be irrebuttably presumed, where the Union effort to accept an earlier Employer proposal came at a time when the Union clearly lacked majority support. The First Circuit noted a then-recent decision of the Seventh Circuit Court of Appeals determining that an earlier management proposal was no longer available for "acceptance" by a Union which had clearly lost its majority support of the workers. <u>Chicago Tribune Co. v. NLRB</u>, 965 F.2d 244 (7th Cir. 1992).

The First Circuit Court of Appeals further noted that in recent decisions, both before this Court[2] as well as before the Eleventh Circuit[3], the Courts had become involved in the issue of whether the Employer had, in fact, a good faith doubt of the continued Union's majority in cases factually identical to the instant case, namely, when that good faith doubt was

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[2]<u>NLRB v. Curtin Matheson Scientific</u>, 494 U.S. 777 (1990)

[3]<u>NLRB v. Bickerstaff Clay Prods. Co.,</u>, 871 F.2d 980 (11th Cir. 1989)

first raised by the Employer only immediately after the allegedly minority Union had attempted to "accept" an earlier management proposal, and those Courts, unlike to Board in this case, had, in fact, determined the issue based on the legitimacy of the Employer's good faith doubts of the Union's majority status. The matter was remanded by the First Circuit to the NLRB to address the apparent inapplicability of the prior Board precedent cited in its June 27, 1991 decision, as well as to address the apparent inconsistencies in the approach taken in prior matters, both with this Court as well as with the Eleventh Circuit, and to address the impact of the Seventh Circuit Court of Appeals decision in Chicago Tribune, *supra*, that an Employer's offer is no longer available to the Union whose majority support has been clearly eroded subsequent to the tendering of the earlier management proposal. The Board was specifically directed by the First Circuit to "act with expedition" and to forward a copy of its Supplemental Decision to the Clerk of the First Circuit "as soon as it can". (Pet. App. p. 83a)

Notwithstanding the First Circuit's mandate to rule on this matter expeditiously, it took the Board a full two and one-half years to finally issue its Supplemental Decision and Award wherein it determined that, for policy considerations of "industrial stability" and "employee freedom of choice", the presumption of majority status must prevail until the Employer expressly challenges that majority status. It further determined that, if an Employer has a good faith doubt as

to the Union's continued majority status, it must initially raise that issue before the Union accepts its offer. In the factual context of this case, the Board's decision, in essence, stated that the fact that the Union moved quicker than the Employer by sending a Sunday evening telegram to the home of the company's president before the management's announcement of withdrawal of Union recognition, in the face of complete and obvious erosion of any Union support, on the following day, a Monday morning, was dispositive of the case, and precluded the Employer from presenting evidence that, at the time of the Union's "acceptance", the Employer had a legitimate doubt of the Union's majority status. (Pet. App. 9a)

The matter was again reviewed by the United States Court of Appeals for the First Circuit on July 21, 1995 and it was determined that, in view of the Board's finally having announced an articulated policy-oriented basis for its determination, the Court would affirm that ruling. The Court specifically noted that, in adopting the Board's rule that an Employer may not raise the issue of the Union's majority status once the Union has "accepted" an earlier management proposal (even though the Employer attempts to raise this issue within a day or, in theory, within an hour after the Union's "acceptance") the First Circuit was reaching "a result different from that by our sister circuit in Chicago Tribune Co." (App. p. 7a).

SUMMARY OF ARGUMENT

This case presents the intriguing issue of whether the established policy of according to a Union an irrebuttable presumption of majority status once a collective bargaining agreement has been reached, should also apply to situations such as this, where, at the time the "agreement" has been reached via the Union's somewhat unorthodox actions in sending a Sunday evening telegram of acceptance in an apparent effort to prevent the Employer from fully assessing the impact of the sudden erosion of Union support, the Employer has not had a realistic and reasonable opportunity to assert an expression of its good faith doubt of the Union's continued majority status. The traditional purpose in establishing such an irrebuttable presumption of continued Union majority status is to preserve a legitimately created and lawfully continued bargaining relationship between the parties. Such an irrebuttable presumption has no place in a factual situation such as is involved here, where the asserted collective bargaining relationship which the Board contends created an irrebuttable presumption of Union majority status was fictitiously created at a time when: (a) the Employer had a basis for believing the Union no longer maintained a majority status; and (b) the Employer had not had a reasonable opportunity to assess the rapidly eroding Union support or to express its doubt as to the Union's continuing majority status.

The Board's determination that an Employer's prior offer for a collective bargaining agreement remains available for acceptance by a Union who, subsequent to the offer having been made, has lost its majority support among employees is so irrational, in view of the objectives of the Act to protect employees' Section 7 rights and to prevent and prohibit Employers from entering into agreements with minority Unions, that it should not be confirmed by this Court. In similar contexts, both the Board, as well as various reviewing Courts, have allowed Employers to introduce affirmative evidence establishing a lack of majority status at the time the "agreement" was reached, and have rejected arguments that once the "agreement" has been reached, the irrebuttable presumption of continued Union majority status prevents the consideration of any Employer contention that, in fact, at the time of the "agreement", the Union was lacking a majority status.

ARGUMENT

I.

WHERE A UNION, WHOSE SUPPORT HAS RAPIDLY DETERIORATED SINCE THE EMPLOYER'S LAST CONTRACT OFFER WAS MADE, SUDDENLY COMMUNICATES ITS "ACCEPTANCE" OF THAT LAST OFFER, THE EMPLOYER SHOULD BE ENTITLED TO RAISE ITS DOUBT AS TO THE UNION'S MAJORITY STATUS AS OF THE DATE OF THE UNION'S "ACCEPTANCE".

The factual situation involved in this case is a recurring one, wherein during

the course of a prolonged strike, the parties continue to negotiate and, when the gradually eroding employee support for the Union reaches a low ebb, the Union is generally inclined to grab "whatever it can" by attempting to "accept" the most recent Employer proposal[4], even though that Employer proposal was likely made by the Employer at a time when either: (1) the Union's support among bargaining unit employees was greater; or (2) the employer may not have been fully aware of the extent of the Union's lack of employee support. Where, as in this case, the Union's "acceptance" of the earlier Employer offer literally comes out of the blue and is sent in such apparent panic circumstances by being telegraphed on a Sunday evening to the home of the company's president only a few days after the final indicia of any employee support for the Union has vanished, the Employer is placed in a position where it must make a rapid assessment and determination of whether, at the time of the Union's effort to capture the benefit of a prior Employer proposal, the Union was, in fact, a representative of a majority of the bargaining unit employees. Prior decisions of other Circuit Courts of Appeals as well as the decision

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[4]In the very similar circumstances involved in Viking Lithographers, 184 NLRB 139 (1970), the Board had referred to such telegrams of "acceptance", sent at a time when the Union's employee support had clearly evaporated, as a "capitulated . . . contractual surrender", sent in the Union's "haste to secure its bargaining status", which would not place any obligation on the Employer to accept.

of this Court in NLRB v. Curtin Matheson Scientific, 494 U.S. 775 (1990) have determined that the critical issue in such circumstances, where the Employer, after receiving such a Union attempt to "accept" a prior offer in the face of eroding employee support, is whether the Employer may reject in a timely fashion such an "acceptance" based on the Employer's good faith belief that the Union, at the time of its "acceptance", no longer possessed the support of a majority of the bargaining unit employees. Unlike the decision in this Court in Curtin Matheson Scientific and unlike the Seventh Circuit Court of Appeals' decision in Chicago Tribune Co. v. NLRB, 965 F.2d 244 (7th Cir. 1992), and unlike the Eleventh Circuit Court of Appeals' decision in NLRB v. Bickerstaff Clay Prods. Co., 871 F.2d 980 (11th Cir. 1989), the First Circuit Court of Appeals determined that the question of the Employer's good faith doubt of the Union's majority status at the time of receiving such a telegram "acceptance" is immaterial, as the agreement is fully consummated by the Employer's receipt of the Union's "acceptance", and that "agreement" constitutes an irrebuttable presumption of the Union's majority status. Thus, the decision of the First Circuit Court of Appeals in this case is inconsistent with at least two other Circuits, as well as with the rationale of this Court.

In NLRB v. Bickerstaff Clay Prods. Co., 871 F.2d 980 (11th Cir. 1989), cert. den. 493 U.S. 924 (1989), the Employer's last offer of November 6 was not accepted but, after further deterioration of the Union's

majority status, was "accepted" by a Union telegram on April 8th. As in the instant case, one day after receiving this "acceptance", management withdrew recognition from the Union and advised the Union that the prior offer was no longer available for "acceptance." While, unlike the instant case, both the Administrative Law Judge and the National Labor Relations Board decided the matter on the question of whether this subsequent expression by the Employer of its doubt of the Union's majority status was, in fact, based upon a good faith doubt, based on objective considerations (a matter which, in this case, the Board and First Circuit are now saying is immaterial, in view of the Union's having sent its "acceptance" one day prior to the Employer's withdrawal of recognition), the Board did argue before the Eleventh Circuit Court of Appeals, as it did in the instant case, that the prior offer of the Employer remained available for "acceptance", notwithstanding the Employer having reasonably concluded in the meantime that the Union no longer represented a majority of the bargaining unit employees. According to the Board's argument in that case, the Employer's offer would be available for such "acceptance" until such time as the Employer expressly either withdrew the offer or withdrew recognition. The Eleventh Circuit Court of Appeals, unlike the First Circuit Court of Appeals in the instant case, determined that there was no such obligation to either withdraw the offer or withdraw recognition.

> "There is no authority cited by the Board, and none exists, for the proposition that withdrawal of a prior offer is a condition precedent to an employer's withdrawal of recognition based on a good faith doubt of the Union's majority status. If the circumstances changed such that the Employer reasonably believed that the Union no longer represented a majority of its employees on April 8, 1986, Bickerstaff had no duty to withdraw its offer by notifying the Union." NLRB v. Bickerstaff Clay Products, 871 F.2d 980, 993-994 (11th Cir. 1989)

The Court of Appeals in that case went on to determine that the Employer was within its rights in rejecting the Union's telegram "accepting" the Employer's prior offer and in withdrawing recognition from the Union, even though this was not done, as in the instant case, until one day after the Union had "accepted" the Employer's prior offer. This decision is, thus, clearly inconsistent with the First Circuit's decision in this case that, notwithstanding an Employer's legitimate, good faith doubt of the continuing majority status of the Union, it is bound by a Union "acceptance" of the Employer's most recent proposal.

Similarly, in Chicago Tribune Co. v. NLRB, 965 F.2d 244 (7th Cir. 1992), the Employer had engaged in a number of collective bargaining sessions with the Union and, after becoming aware of the nearly complete erosion of the Union's support among employees, had not specifically

withdrawn its earlier offers to the Union. It was only several days after the Union's eventual "acceptance" of the Employer's earlier offer that the Employer, for the first time, formally took the position that at the time of the Union's "acceptance", it no longer represented a majority of the employees. As in the instant case, the National Labor Relations Board took the position that the acceptance of the Employer's earlier offer bound the Employer to a collective bargaining agreement, and it was too late for the Employer to maintain that, at the time of that "acceptance", the Union no longer represented a majority of the employees. That position was rejected by the Seventh Circuit Court of Appeals on the basic rationale that an Employer may not legally consummate an agreement with a Union when, at the time of that "consummation", the Employer has reason to believe that the Union does not represent a majority of its employees. The Seventh Circuit Court of Appeals also placed great emphasis on the fact that to allow a Union to suddenly grasp an earlier Employer offer at a time when the Union's support has disappeared and, simply because the Employer has not formally withdrawn either the offer or its recognition of the Union, to force its employees to be bound by a collective bargaining agreement with a Union with whom they no longer have any allegiance is unduly and unnecessarily penalizing those employees. The Court drew careful distinctions between situations such as those involved in this case where, in the absence of any bad faith bargaining by the Employer, the Employer simply had not

formally withdrawn its prior offer or Union recognition in the face of the Union's eroding support, and cases where the Employer refuses to comply with its statutory obligation to bargain in good faith and, as the result of such refusal, the employee support eventually erodes. The Court suggested that in the latter case, the Employer would not be in a position to reject the Union's acceptance of any Employer offer, as the Employer itself has illegally contributed to the erosion of the Union's support. There is no suggestion that any such circumstances existed in the instant case. The Court of Appeals for the First Circuit in the instant case expressly acknowledged that its determination would be contrary to this decision of the Seventh Circuit Court of Appeals in Chicago Tribune. (App. p. 7a)

The facts of the instant case are also remarkably similar to those involved in NLRB v. Curtin Matheson Scientific, 859 F.2d 362 (5th Cir. 1988) rev'd. 494 U.S. 777 (1990). In that case, the Employer had made an offer to the Union on June 12th, and after serious erosion of Union support, the Union finally "accepted" the offer on July 16th. Four days later, the Employer declined the Union's "acceptance" and, for the first time, formally announced its withdrawal of that earlier offer, based on its doubts as to the Union's majority status as of the date the Union purported to "accept" the Employer's offer. The Fifth Circuit Court of Appeals determined that on those facts, there was no violation of Sections 8(a)(1) and 8(a)(5) by the Employer refusing to execute an

agreement, and by withdrawing its recognition of the Union. Most significantly, unlike the Court of Appeals in the instant case, it did not consider a legitimate agreement to have been entered into simply by the Union's attempting to "accept" the Employer's last proposal. Obviously, if the Fifth Circuit had felt that the mere "acceptance" by the Union of the earlier Employer offer resulted in an "agreement", there would have been no need for the Court of Appeals even to have considered the legitimacy of the Employer's claim, made four days after this "acceptance" as to the Union's lack of majority status.

On appeal, a majority of this Court determined that the Employer's asserted basis for its contention that the Union no longer maintained a majority status (the existence of a number of striker replacements which the Employer had assumed did not support the Union) was not a legitimate basis for the Employer's withdrawal of recognition. But, under the rationale of the First Circuit in the instant case, there would have been no need to have even reached that issue if the Union's "acceptance" of the Employer's earlier offer constituted a binding agreement, regardless of the Employer's feeling that the Union then no longer enjoyed a majority status.

Similarly, the extended dissenting opinions of four members of this Court determining that the Employer had not violated the statute by refusing to execute an agreement with the Union necessarily assumed that a binding contract was not

consummated simply by the Union's "acceptance" of the Employer's earlier offer. 494 U.S. at 798, 801

Thus, the eventual determination of the Board, as affirmed by the First Circuit Court of Appeals, that the Employer's claim of a good faith doubt of the Union's majority status should not even be considered if that claim is formally announced the day after the Union's telegram of "acceptance" is immaterial, is inconsistent with the manner in which this Court and other Circuits have dealt with that same factual situation.

II.

THE BOARD RULING THAT AN "AGREEMENT" CREATED BY A UNION'S "ACCEPTANCE" CREATES AN IRREBUTTABLE PRESUMPTION OF THE UNION'S MAJORITY STATUS, THUS RENDERING IMMATERIAL THE EMPLOYER'S EVIDENCE OF THE UNION'S ACTUAL LACK OF MAJORITY STATUS, IS INCONSISTENT WITH THE DOCTRINE THAT THE CREATION OF SUCH A MAJORITY STATUS PRESUMPTION MUST HAVE BEEN LEGITIMATELY AND LAWFULLY ESTABLISHED.

This Court has approved in various circumstances the Board's creation of either irrebuttable or rebuttable presumptions of a Union's majority status. For example, a Union certified by an NLRB election is irrebuttably presumed to have a majority status for a one-year period after the Board certification; after that one-year period, its majority status has only a rebuttable presumption, and the Employer may properly raise, after that one-year

period, a claimed good faith doubt as to the majority status of the Union. NLRB v. Curtin Matheson Scientific, 494 U.S. 775 (1990); Fall River Dyeing and Finishing Corp. v. NLRB, 482 U.S. 27, 37 (1987)

Similarly, a Union who has entered into a valid collective bargaining agreement with an Employer is irrebuttably presumed, during the course of that agreement, to have a majority status among bargaining unit employees; after the expiration of that collective bargaining agreement and during the course of negotiations for a successor agreement, the Union is deemed only to have a rebuttable presumption of a majority status. NLRB v. Ironworkers, 434 U.S. 335, 343 (1978)[5]

To the same effect, a Union who enters into a recognition agreement with an Employer is irrebuttably presumed to have a majority status for "a reasonable time" after that recognition agreement is reached. The rationale for such a policy creating presumptions of majority status

[5]In this case, while there was an NLRB Certification in 1977, (App. 69a), the rebuttable presumption of the Union's majority status which was applicable in the 1988 negotiations was based on the recently-expired agreement, and not on the earlier Certification. (Indeed, none of the 1988 employees were even employed at the time of the 1977 Certification. (App. p. 55a) Similarly, the "irrebuttable presumption" upon which the Board is now relying so as to preclude the Employer's evidence of the Union's loss of majority is the "contract" created by the Union's November 27, 1988 telegram; it is not based on the original 1977 Certification.

is that "a bargaining relationship, once rightfully established, must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed". Franks Bros. v. NLRB, 321 U.S. 702, 705 (1944) This Court has more recently noted that this type of presumption of majority status is intended to "promote stability in collective-bargaining relationships, without impairing the free choice of employees". Fall River Dyeing and Finishing Corp. v. NLRB, 482 U.S. 27 (1987) Obviously, the creating of an irrebuttable presumption of Union majority status will have an unavoidable impact of infringing on the ability of bargaining unit employees to engage in activity otherwise protected by Section 7 of the Act, such as challenging an incumbent Union's majority status or in seeking certification by another Union or in attempting to refrain from Union activity. However, as this Court noted in NLRB v. Financial Institution Employees of America, 471 U.S. 1098 (1986), the preference for industrial stability created by lawful collective bargaining relationships must prevail over the incidental impact the protection of collective bargaining relationships may have on the ability of the employees to engage in otherwise available Section 7 activities. Moreover, while that deprivation of Section 7 rights might be justified in order to protect legitimate collective bargaining relationships, it is an impermissible infringement on Section 7 rights and a clear violation of

the principles of Section 8(a)(2)[6] of the Act to extend such a presumption of majority status to relationships which are based on Union agreements unless the Union agreement itself was lawfully entered into; where the agreement was not lawfully entered into, such an agreement should not serve as the vehicle for the creation of such majority status presumption, so as to deprive employees of their Section 7 rights.

For example, in Royal Coach Lines v. NLRB, 838 F.2d 47 (2nd Cir. 1988), the Employer had entered into a recognition agreement with the Union. Such an agreement ordinarily would create an irrebuttable presumption of Union majority status, at least for a "reasonable period of time". In that case, the Employer, upon being advised that at the time of the recognition agreement, the Union, in fact, did not represent a majority of its employees, immediately repudiated the agreement and disavowed any obligation to deal with the Union, based on its good faith doubt that the Union had not represented a majority of the employees. The Second Circuit Court of Appeals acknowledged the general irrebuttable presumption of the Union's majority status flowing from such agreements, but indicated that the general

[6]Under Sections 8(a)(2) and 8(b)(1),, it is clearly illegal for an Employer or Union to negotiate or enter into an agreement when the Union does not represent a majority of the employees. International Ladies Garment Workers Union v. NLRB, 366 U.S. 731, 732-733 (1961)

rule for the operation of presumptions of Union majority status "must be limited to those bargaining relationships that have indeed been 'lawfully established'". The Second Circuit quoted language from an earlier decision in NLRB v. Cayuga Crushed Stone, 474 F.2d 1380 (2nd Cir. 1973), where the presumptions flowing from a Union recognition agreement were limited to those agreements which were "valid" at the time of their consumption. The court also noted in its earlier decision in NLRB v. All Brand Printing Corp., 594 F.2d 926, 929 (2nd Cir. 1979), that the basis for this presumption of Union majority status must be a "valid" agreement. This Court, in Franks Bros. v. NLRB, 321 U.S. 702 (1944), indicated that the collective bargaining relationships which are to be protected by the aforesaid presumptions of majority status must have been "rightfully established" in order to receive the protection of such presumptions. Otherwise, "the interest in protecting bargaining relationships could not justifiably outweigh the burdens on employee freedom that flow in some circumstances from the imposition of a period of irrebuttably presumptive Union majority support". Royal Coach Lines, 838 F.2d 47 at 52.

The Board itself has noted the distinction that must be drawn between creating presumptions of Union majority status from valid agreements, as opposed to those which are invalid as a result of the Union not maintaining a majority status as of the time of the entering into of the contract. In Moisi & Son Trucking, 197 NLRB 198, (1972), it was determined that an

Employer who has entered into a voluntary recognition agreement with the Union is faced with an irrebuttable presumption that the Union represents a majority of its employees, and must deal with the Union for a reasonable period of time, "unless he introduces affirmative evidence proving a lack of majority at the time of the recognition agreement". (Emphasis added)

III.

EVEN IF A REQUIREMENT EXISTED THAT AN EMPLOYER, SUDDENLY FACED WITH THE BASIS FOR ASSERTING A DOUBT OF THE UNION'S MAJORITY STATUS, MUST WITHDRAW ANY OUTSTANDING CONTRACT PROPOSALS, IT SHOULD BE AFFORDED A REASONABLE PERIOD OF TIME TO WITHDRAW OUTSTANDING CONTRACT PROPOSALS OR TO ASSERT ITS DOUBT OF THE UNION'S MAJORITY STATUS.

Under the Board's own guidelines, an Employer's offer for a collective bargaining agreement will remain available for acceptance until it is expressly withdrawn, unless circumstances arise which would lead the parties to reasonably believe that the offer was no longer available, or "unless there are intervening circumstances which would make it unfair to hold the company to its offer." Pepsi Cola Bottling Co. v. NLRB, 659 F.2d 87, 89-90 (8th Cir. 1981) One of the circumstances that could frequently arise between the making of such an offer and the Union's subsequent attempt to "accept" that offer is the loss of the Union's majority status and, as noted above, (pp. 15-16), the Eleventh Circuit Court of Appeals has expressly noted that in those circumstances, the Employer has no duty to withdraw its offer from what has now become a minority Union. NLRB v. Bickerstaff Clay Prods., 871 F.2d 980, 993-994 (11th Cir. 1989)

Moreover, even if the Board were to administratively create such a duty, common sense dictates that the time within which an Employer must withdraw its offer should be dictated by the circumstances which have led the Employer to believe that the Union no longer maintains its majority status. Obviously, an Employer who has made a prior contract offer to the Union and is subsequently presented, for the first time, with compelling evidence which would serve as the basis for a good faith belief on its part that the Union no longer maintains a majority status, should not be held committed to a Union contract if the Union, within minutes or hours of the Employer's receiving that information, telegraphs its "acceptance" of the Employer's offer. The Employer should have a reasonable opportunity not only to investigate and verify the information, which, if confirmed, would serve as the basis for the Employer's good faith doubt of the Union's majority status, but the Employer should also have a reasonable period of time to communicate its good faith doubt to the Union. Clearly, if the Employer prematurely and without properly investigating and verifying the information that could lead to a good faith doubt of a Union's majority status, withdraws recognition from the Union, it has exposed itself to an unfair labor practice charge.

NLRB v. Laverdiere's Enterprises, 933 F.2d 1045, 1051-1053 (1st Cir. 1991); Bolton-Emerson v. NLRB, 899 F.2d 104, 106 (1st Cir. 1990) The need for the Employer to have at least a reasonable opportunity to assess the factual basis for any possible belief that the Union no longer maintains majority status is emphasized by the fact that if it were to continue to recognize and deal with a Union, after becoming aware of the basis for a belief that the Union no longer maintains a majority status, it has violated Section 8(a)(2) of the Act. International Ladies Garment Workers Union v. NLRB, 366 U.S. 731, 732-733 (1961) It would be an unfair and unreasonable requirement to place a burden upon the Employer to have to go through the difficult and prolonged process of accurately evaluating the current majority status of the Union (at the peril of incurring possible Unfair Labor Practice charges)[7] and then to have to decide whether or not to formally announce its disavowal of its obligation to deal with that Union within a matter of hours or even days of the Employer's first receiving the factual information which could

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[7]The dilemma faced by an Employer having to determine when it is permissible to assert its good faith doubt that the Union no longer maintains a majority status is demonstrated in the instant case where the Board's decision implies that the Employer waited too long to announce its decision, yet General Counsel, before the Administrative Law Judge, argued at length that, even as of November 28th, when the Employer announced its good faith doubt, the Employer did not yet have a sufficient factual basis for that good faith doubt.

serve as a possible basis for the conclusion that the Union no longer enjoyed a majority status.

While in this case, the Board is attempting to depict the Employer as one casually "sitting back" and methodically deciding if and when it will announce it's doubt of the Union's continuing majority status, or whether it will continue to negotiate with a minority Union in an attempt to obtain a more favorable contract (Pet. App. p.36a), the facts of this case clearly negate any such reference and demonstrate the need for allowing at least a reasonable period of time for an Employer to assess and evaluate the facts creating a possible good faith doubt of the Union's majority status. While the Employer had limited information that several months prior to the strike, one or two employees had expressed dissatisfaction with the Union (App. p. 31a, 46a, 60a), and that some employees had crossed the picket line and resigned from the Union (App. p. 9a, 13a, General Counsel Exhibits 2a, b, c, d, 3a, b, c, d, 4) and that a few strike replacements had been hired (App. p. 40a), it certainly had far less than an adequate basis for disavowing an obligations to deal with the Union as of November 17, 1988, when it made its last offer to the Union. As the Board has ruled on a number of occasions, the mere fact of several employees crossing a picket line and re-signing from the Union and several additional employees being hired as strike replacements is an inadequate basis for refusing to recognize the Union. Station KKHI, 284 NLRB No. 113 (1987);

John's-Manville Sales Corporation, 289 NLRB No. 40 (1988); Wallkill Valley General Hospital, 288 NLRB No. 18 (1988) It was only after the Union withdrew its picket line during the day of Friday, November 18th, and throughout the following week, that a continuous and changing barrage of events took place that served as the factual basis for the Employer's forming a possible belief that the Union no longer enjoyed the support of a majority of its employees. For the balance of that day and throughout the following week of November 21st, not only did a number of employees who had been either picketing or honoring the picket line return to work and express to management representatives their lack of support for the Union and, in some instances, actually resign from the Union, but a number of heretofore Union supporters announced for the first time, during that same period, that they had decided to accept permanent employment elsewhere, and accordingly, would not be considered any longer to be bargaining unit employees in the Employer's assessment of whether the Union had the support of a majority of the bargaining unit employees. See Appendix to Brief, p. App. 1 detailing the apparent change in union support status of 13 employees during that 3-or 4-day period. The change in apparent status of some 13 employees in a relatively small unit consisting of some 23 employees was not made known to the Employer until after the picket line was withdrawn on November 18th and throughout the work

week of November 21st[8]. It stands to reason that a relatively small Employer who is attempting to run its commercial enterprise would need to investigate and to assess the changed circumstances in which it found itself, as the result of the change in status of these 13 employees, and it would be an unreasonable burden to force such an Employer to prematurely announce its disavowal of its obligation to the Union, and thus incur the risk of exposure to an unfair labor practice charge. Clearly, such an Employer should have at least a few days to assess its position and, even if this Court were to disagree with the determination of the Eleventh Circuit Court of Appeals in Bickerstaff Clay Products, supra, p. 15-16, and the Seventh Circuit Court of Appeals in Chicago Tribune Co. v. NLRB, supra, p. 17-18, that an Employer who is placed in the posture of having a good faith belief of the Union's loss of majority status need not expressly withdraw any outstanding contract proposals or withdraw recognition from the Union, it certainly should have at least a reasonable period of time to assess its position and to decide the appropriateness of withdrawing outstanding contract proposals and/or withdrawing recognition from the Union. Not only should it be allowed a reasonable time to

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[8]The time which was available to the Employer to assess and analyze the sudden shift in employee support for the Union was, in fact, even more limited, as the result of the work week of November 21st being a short work week, due to the Thanksgiving holiday.

assess the information available to it and to analyze that information, it clearly has, as the Court noted in International Ladies Garment Workers Union v. NLRB, 366 U.S. 731, 739 (1961), a statutory responsibility to carefully analyze the information available to it to assure itself whether the Union, in fact, represents a majority of its employees.

It is respectfully submitted that the Board's decision, depriving the Employer of a reasonable period of time to assess and determine the status of the Union merely upon the fact that the Union, currently having become aware of its total lack of support, sends a telegram of capitulation, that such a telegram deprives the Employer of an opportunity to react to the Union's sudden loss of majority status is so lacking in persuasive logic that it should not be enforced by this Court. Moreover, that Sunday evening telegram of capitulation, according to the Board, ensnares the employees of a company in a three-year affiliation with a Union with which the employees have affirmatively disclaimed any support.

IV.

THE JUDICIAL DEFERENCE TO NLRB INTERPRETATIONS OF THE ACT IS INAPPLICABLE WHERE THE BOARD'S STATUTORY INTERPRETATION IS UNPERSUASIVE OR RESTS ON ERRONEOUS LEGAL FOUNDATIONS, OR IS NOT SUPPORTED BY THE HISTORY OR LANGUAGE OF THE ACT.

In dealing with the traditional argument of the Board in seeking enforcement of its

Orders, that its interpretation of the Act should be granted judicial deference, this Court has determined on a number of occasions that such judicial deference is inapplicable where the Board's Order "rests on erroneous legal foundations", Lechmere v. NLRB, 502 U.S. 527, 539 (1992); NLRB v. Babcock & Wilcox, 351 U.S. 105 (1956), and the deference to NLRB statutory interpretations is limited to circumstances in which the Board's interpretation of the Act is both "rational" and "consistent with the statute". NLRB v. Food and Commercial Workers, 484 U.S. 112, 123 (1987) Thus, whenever the Board's argument in support of its statutory interpretation is either "unpersuasive" or the Board's views are not supported by the history or language of the statute, the Court will not defer to the administrative interpretation of the statute. NLRB v. Radio and Television Broadcast Engineers, 364 U.S. 573, 581, 584 (1961) Where the Board has adopted "presumptions", this Court has noted that the judicial role is to insure that there is a sound connection between the proven facts and the inferred facts created by the presumption. NLRB v. Baptist Hospital, 442 U.S. 773, 787 (1979), quoting Republic Aviation Corp. v. NLRB, 324 U.S. 793, 804-805 (1945) and Beth Israel Hospital v. NLRB, 437 U.S. 483, 501 (1978) for the proposition that such NLRB-created "presumptions" should be upheld only if there is a rational basis, based on the proven facts, for the inferences created by those "presumptions".

In NLRB v. Brown, 380 U.S. 278 (1965), the Court set forth in detail the applicable standards for review of cases where the Court feels that the Board has acted in a manner inconsistent with the statute or which may frustrate the policies underlying that statute.

> "Courts should be "slow to overturn an administrative decision," NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112, but they are not left "to 'sheer acceptance' of the Board's conclusions," Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803. Reviewing courts are not obliged to stand aside and rubber stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute. Not only is such review always properly within the judicial province, but courts would abdicate their responsibility if they did not fully review such administrative decisions. Of course due deference is to be rendered to agency determinations of fact, so long as there is substantial evidence to be found in the record as a whole. But where, as here, the review is not of a question of fact, but of a judgment as to the proper balance to be struck between conflicting interests, "[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress. American

> Shipbuilding Corp. v. Labor Board, supra [380 U.S. 300 (1965)]"
>
> Courts must, of course, set aside Board decisions which rest on "an erroneous legal foundation. NLRB v. Babcock & Wilcox, [351 U.S. at 112-113]"
>
> 380 U.S. at 291; see also cases cited therein at footnote 5.

It is submitted that this case projects the very type of circumstances in which judicial deference to a Board's decision should be withheld. The very concept of the Board ordering an Employer to enter into an agreement with a Union which the Employer clearly and legitimately feels it had reason to believe did not represent anything close to a majority of its employees is certainly one that must be supported by either clear statutory language or by strong and persuasive policy considerations. Obviously, the statutory language does not support such a conclusion, as the congressional mandate is clear that collective bargaining relationships should only be protected when entered into with majority Unions, and the establishment of such collective bargaining relationships with minority Unions not only is expressly prohibited by Section 8(a)(2) of the Act, but is would also clearly restrict the Section 7 rights of the employees.

More specifically, the "policy" determinations which the Board claims to support its "presumption" that a Union with little

or any employee support who is astute enough to literally race to the closest telegraph office to fire off a communication to the Employer "accepting" the Employer's last offer, at a time when the Union was presumably aware of its lack of employee support, are so lacking in rational or statutory support that they should not be deferred to by this Court.

The Board's creation of a presumption of a majority status as the result of an allegedly minority Union having "accepted" the company's last offer, which "acceptance" bars consideration of the Employer's evidence that, in fact, the Union did not have majority support, flies in the face of the rationale of this Court in International Ladies Garment Workers Union v. NLRB, 366 U.S. 731, 737 (1961), indicating that the unlawful "genesis" of such an "agreement" precludes its subsequent use to establish (or, in this case, to presume) the Union's majority status.

As noted above on pages 23 to 25, such policy considerations intended to protect collective bargainng relationships are properly limited to the protection of legitimately established and continued collective bargaining relationships and should not be stretched beyond recognition so as to apply to a Union's effort to continue that bargaining relationship by sending surprise telegrams on a Sunday evening to the home of the Employer's president, in a hasty effort to attempt to secure, for another three years, a collective bargaining agreement so as to capture within the web of that agreement employees

who had clearly and recently indicated their lack of interest in that Union. It is respectfully submitted that such an irrational basis for an even more irrational result cannot serve as a proper justification of what the Seventh Circuit noted to be a clear infringement upon the Section 7 rights of the employees. Chicago Tribune, supra, 965 F.2d at 249-250

CONCLUSION

For the reasons set forth above, it is respectfully requested that this Court reverse the Decision of the Court of Appeals for the First Circuit below, and order that this case be remanded to the National Labor Relations Board for a determination of whether, at the time of the receipt by the Employer of the Union's telegram purporting to "accept" the Employer's last offer, the Employer maintained a good faith doubt of the Union's majority support of employees within the bargaining unit.

Dated this first day of March, 1996.

Respectfully submitted,

JOHN D. O'REILLY, III

O'REILLY & GROSSO
77 Turnpike Road
P. O. Box 77
Southborough, MA 01745-0118
(508) 460-1500

Counsel for Petitioner.

APPENDIX 1A

Employees who were apparent Union supporters and who advised the company on or after November 18, 1988 of their change of position to lack of support for the Union are:

1. Gary Boudreau, who picketed through the last day of picketing, November 18th, advised the company on the 18th that he was "disgusted" with the Union. He returned to work on the 21st and advised the company that he would resign from the Union that week; he confirmed with the company later that week that he had resigned from the Union. (App. 29a)

2. Rocco Aliberti came into the company after the picketing stopped on the 18th, and advised the company he was not a supporter of the Union, and would vote against the Union. (App. 17a-18a)

3. Robert Cibelli had been picketing and was one of the three remaining picketers, as of November 18th. On the 18th, he advised the company he would be returning to work the following week, and during the week of November 21st, he advised the company he had resigned from the Union, and that he was no longer a Union supporter, and was happy that the Union was no longer at the company. (App. 23a-25a)

4. David Duplisea had not worked during the strike and came in after the picket line was withdrawn. He then advised the company that he was against the Union and that he didn't feel that a Union was needed at the company and that he would vote against the Union, and that he resigned from the Union. (App. 31a-32a)

5. Quang Nguyen had honored the Union picket line, and advised the company on the 18th that he would be returning the week of November 28th, and that he intended to resign from the Union. (App. 33a-34a)

Apparent Union supporters who advised the company on November 18th that they were employed permanently elsewhere, and would not be returning to the company:

1. Union Steward Joe Parenti (App. 25a-26a)

2. Richard DeLarda (App. 19a, 47a)

3. Paul McCarthy (App. 25a-26a)

4. Ken Seaver (App. 26a, 30a-31a)

5. Michael Coyne (App. 32a)

Additionally, McCarthy advised the company on the 18th of his assessment that the Union no longer had support among most of the employees. (App. 28a)

Additionally, the Employer had been aware of various other employees previously crossing the picket line, resigning from the Union, and disavowing any support for the Union.

(App. 18a, 22a, 28a, 33a, 35a and 38a-39a)